In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1180

CHARLES N. ANDERSON AND GRACE M. ANDERSON, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The issue involved in this case is whether the value of meals and lodging furnished petitioner[1] by his employer may be excluded from gross income under § 119 of the Internal Revenue Code of 1954.[2] Peti-

[1] Mrs. Anderson is a party only because she and her husband filed joint tax returns for the years here in question; Mr. Anderson will be referred to as petitioner.

[2] Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if— (continued)

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tioner was employed as the manager of a motel. During 1956 and 1957 he lived with his family in an apartment in the motel. In 1957 his employer erected a house on a lot two short blocks from the motel; beginning in July, 1957, petitioner's employer required him to live in the house and to be available for service at the motel 24 hours a day. The employer also provided petitioner with free utilities, laundry, cleaning services, and certain food. The Tax Court permitted petitioner to exclude from his 1958–1960 gross income the value of the lodging, meals, etc., furnished to him. The court of appeals reversed.

1. Section 119 permits a taxpayer to exclude from his gross income the value of any meals and lodging furnished by his employer provided (1) that the meals and lodging are furnished for the convenience of the employer; (2) that they are *furnished on the business premises of the employer,* and (3) that, with respect to lodging, the employee is required to accept it as a condition of his employment. The Tax Court, in an unreviewed opinion by Judge Scott, found that the residence in this case was acquired by the employer for a business purpose, that it was located within two short blocks of the motel, and that petitioner was required to live therein as a condition of his employment; from these facts the court concluded

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(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

* * * * *

that the residence was integrated with, and therefore was "on" the employer's business premises.

Subsequently, in February, 1965, the full Tax Court decided *Dole* v. *Commissioner,* 43 T.C. 697. In that case the employer required certain of its executives to live in company-owned houses located approximately one mile from the mill. The Tax Court's majority opinion held § 119 inapplicable on two grounds. First, the court held that "it was not necessary for these petitioners to live in the company-owned houses to perform their duties adequately." Second, the court held that "These company owned-houses were not located 'on the business premises' of [the employer]." 43 T.C. at 706–707. In a concurring opinion Judge Raum "explicitly disapproved" of Judge Scott's decision in the instant case and stated that it was "wrong." 43 T.C. at 709. He stated that when Congress used the term "on the business premises" of the employer, it intended to confine the exclusion and did not intend to encompass a lodging located at some nearby or convenient place.[5] The First Circuit specifically affirmed the decision of the Tax Court "on the concurring opinion of Judge Raum." 351 F. 2d 308.

The majority of the Sixth Circuit in the instant case rejected Judge Scott's holding and, instead, cor-

[5] Judge Scott also wrote a concurring opinion in *Dole,* in which she agreed with the majority's first ground, *i.e.*, that the taxpayers were not required to live in the homes to perform their duties properly. However, she disagreed with the majority's holding that the houses were not "on" the employer's business premises, stating that the majority had cut back on her holding in the instant case. 43 T.C. at 709–711.

rectly agreed with the decision of the First Circuit and with Judge Raum's concurring opinion in *Dole*, that § 119 requires the lodging to be located "on" and not merely "near" the employer's business premises.

2. Petitioner's argument (Pet. 11) that the instant decision conflicts with *United States Junior Chamber of Commerce* v. *United States*, 334 F. 2d 660 (Ct. Cl.), is incorrect. In the *Junior Chamber of Commerce* case the court found that part of the Chamber's official activities were carried out at the house which it furnished to its president, and that the house was thus part of the employer's business premises. The court of appeals in this case as well as the Tax Court and First Circuit in *Dole* agreed that if the employer carried on some of its business activities at the house furnished to the employee, the house would be part of the employer's business premises. However, in the instant case, petitioner did not perform any significant portion of his duties at his residence (Pet. 15a).[4]

Petitioner also contends (Pet. 6–10) that the instant decision conflicts with *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5), and *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8). In both of these cases State highway patrolmen received a cash allowance from

[4] Likewise, there is no conflict between the present case and *Boykin* v. *Commissioner*, 260 F. 2d 249 (C.A. 8), cited by the taxpayer (Pet. 11). In *Boykin* it was undisputed that quarters furnished to the taxpayer on the hospital ground were located on the premises of the hospital where he was employed; the only issue on appeal was whether the quarters were furnished primarily for the employer's convenience if the employee was charged payment for the quarters.

the State for meals purchased at various restaurants located adjacent to the highways while on duty. One of the numerous issues before the courts of appeals was whether restaurants located adjacent to the highways were on the business premises of the State troopers' employer. In holding against the government, the courts said that a State patrolman's duties were unique in nature and that this permeated the question of identifying "the business premises of his employer" (*Barrett*, 321 F. 2d, p. 912):

> The major "business" of this state law enforcement agency is obviously not confined to isolated station houses; rather, it covers every road and highway in the state twenty-four hours a day every day. In view of the special nature and functions of the highway trooper's work, it is unrealistic to treat the employer's place of business as limited to the state patrol headquarters. * * *

And the courts also stated that this rationale did not necessarily apply to other employees (*Morelan*, 356 F. 2d, p. 203):

> It is conceivable, plausible and believable, in the present Highway Patrolmen context, to call all state land the business premises of the state since the state can regulate, tax and exercise a great deal of control over the land. Such is not true of a private employer, whose business premises are arguably limited to that which can be controlled and regulated by him.

Thus *Barrett* and *Morelan*, limited as they are to the unique situation of State highway patrolmen, are not in direct conflict with the decision in the instant case.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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